UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

CIVIL ACTION. 05-11171-WGY

JOHN R.HALLUMS
Petitioner,

V.

LOIS RUSSO
Respondent,

PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF WRIT OF HABEAS CORPUS 28 , U.S.C. 2254(b)

Respectfully Submitted
By Petitioner-Pro-Se

JOHN R.HALLUMS,JR.
1 Administration Road
Bridgewater, MA. 02324

Dated: 12.14.06

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

JOHN R. HALLUMS, JR.

CIVIL ACTION
NO. 05-cv11171-WGY

v.

LOIS RUSSO

MEMORANDUM OF LAW IN SUPPORT OF WRIT OF HABEAS CORPUS 28,U.S.C. 2254(b)

ISSUES PRESENTED

I. INEFFECTIVE ASSISTANCE OF COUNSEL WHERE COUNSEL FAILED TO INVESTIGATE FOR PRE-TRIAL AND TRIAL.

(a) Trial counsel's failure to call the potential witnesses to testify at trial.

(b) Trial counsel deprived the petitioner effective assistance of counsel where he failed to subpoena medical records of the accused.

(c) Trial counsel deprived the petitioner's effective assistance of counsel where he failed to investigate the weapon "ROCK" for blood, skin tissue, hairs or fibers ect..., alleged used in the assault, and failure to obtain photographs of the scene of the alleged assualt for trial purposes.

II. PROSECUTION'S CLOSING STATEMENTS WENT BEYOND THE REALM OF "FAIR" AND WERE INFACT PREJUDICIAL CREATING A RISK OF A MISCARRIAGE OF JUSTICE.

(a) Prosecutor's closing statements relevant to the alleged weapon the "ROCK" were overzealous and prejudicially misleading.

(b) Prosector's closing statements based on the petitioner's race deprived the petitioner of a fair trial, when he injected comments on race.

III. THE ARMED BUGLARY AND HOMEINVASION CHARGES NEVER REACHED THE ELEMENTS OF THE INDICTMENT CHARGES.

(a) The accuser claimed he was pushed through a door in a struggle and then retreated, there was no actual breaking in this case.

(b) There was no person within the dwelling at the time of the alleged breaking to constitute a home invasion.

STATEMENT OF CASE

A jury in the Hampden County Superior Court (Ford, J. Presiding) convicted John Hallums, March 21, 2001, for armed Home Invasion, Armed Burlary, Assault Battery with a Deadly Weapon, and Assualt and Battery. Sentence was imposed 20 to 30 years. Mr. Hallums, filed a direct appeal wherein appellate counsel contested the conviction of armed home invasion and armed burglary, contending that overcharging led to the incorrect application of essential elements to the evidence and that the Motion For a Required Finding of not Guilty should have been allowed on these charges. Commonwealth v. Hallums, 61 Mass.App.Ct. 50 (2004) affirmed, and further appellate review was denied without hearing . See Hallums, 442 Mass. 1104 (2004).

On May 29, 2003, the Appellate Division, at Norfolk, ordered: "that the judgement imposing said sentence be amended by the substituting for said sentence for a term of 20 years and one day, and the judgement of the assault and battery with a deadly weapon dismissed." Mr. Hallums was resentenced in accordance with these orders to 20 years and one day.

On May 4, 2005, Mr Hallums, filed a Motion for a New Trial based on the facts of no due process from the day of his arrest

that led to ineffective assistance of counsel and deprived him of a fair trial.

On May 17, 2005, FORD, J., denied the Motion For A New Trial without an evidentiary hearing. Mr. Hallums sought for further Appellate review on September 11, 2006, and was denied.

STATEMENTS OF FACTS

On the evening of September 19, 2000, Mr Kenny an off-duty Springfield police officer saw from his livingroom window three blackmen exit their car, cross the street, and enter a public park. (Tr. 2/39, 2/42). The officer then called the records division to learn if their car was stollen (Tr. 2/46, 2/97, 2/110, 2/133-34), because the three men were not from his neighborhood (Tr. 2/99). While waiting for the records check, the officer confronted the men . (Tr. 2/122).

At trial, Mr. Kenny, testified that an altercation ensued with a physical combat proceeding from the street to the side walk, up the stairs to his front porch of the enclosed porch, and across the porch through the front door, and into his hallway. (Tr. 2/45, 2/53-58). a witness, retired Springfield officer witness the commotion at the front of the house. (Tr. 2/181. 2/187). This witness testified that he recognized Mr. Kenny, whom he knew on the stoop of the door into the front room. (Tr. 2/184, 2/185). This witness also testified he saw ("kind of heavy set, dark complexion, colored fellow at the doorway or on the door, not into the front room (Tr. 2/186), right in the doorway.") The witness was unable to identify any of these three men. (Tr. 2/191).

Another witness, who is a school custodian driving down the street at the time of this incident, testified at trial that he saw two black men pushing Mr. Kenny up the stairs into the porch, and he saw Mr. Kenny pushing them back down the stairs. (Tr. 2/216. 2/223, 2/217-219, 2/224-225, 227). The custodian said, he saw the largest of the three blackmen throw a brick or a rock at Mr Kenny who dodged it as it hit the frame of the house porch. (Tr.2/222, 2/226). He saw no bottles, (Tr. 2/222), but he did witness one of the three men knock down the retired police officer. (Tr.2/228). The custodian was unable to identify any of the three blackmen. (Tr.2/228).

At trial, Mr. Kenny maintained that he was hit in the face "pretty hard" with the rock in the defendant's hand. (Tr.2/103). Despite the intensity of the combat to which Mr. Kenny had testified he was struck 15 to 20 times, (Tr.2/118), he was not certain if the rock came in contact with his face. (Tr.2/103-104). Mr. Kenny had no bleeding, (Tr.2/104, 2/117, 2/118), nor did he receive any marks other than a swollen nose. His glasses were cracked, and he had minor brusing on his back. (Tr.2/127-128). He said he spent four to five hours at a hospital, (Tr.2/125), but police took no photos of Mr. Kenny. (Tr.2/118, 2/121). There was no damage to the porch, the front door, nor the hallway of the house. (Tr.2/129).

The defendant Mr. Hallums maintains that Mr. Kenny unjustly profiled them, immediately determining that their car was stolen came outside into the street and provoked a confrontation with the three men. (Tr.2/133). The bottles that were alleged to be weapons showed no finger prints impicating any of the three def-

endant s. (Tr.3/14). The photo that was admitted to show where they found the bottles, showed no bottles in them. (Tr.2/105). The police did no testing of any kind on the "rock", brick placed in evidence. (Tr.3/17).

There were no photos of the porch to determine whether four men could brawl in that small erea without touching anything or damage anything. (Tr.3/27). Like wise, the retired officer and the custodian each gave different testimony, one witness said it was two men, and the other witness said it was three men. In general, they gave two totally different versions than Mr. Kenny's. (Tr.3/38).

Mr Hallums maintains that Mr. Kenny did testify that all three men were the three men involved in this incident; However, he is the only person prosecuted by the Commonwealth. The two co-defendants never testified at defendant's trial. (Rule 30 Motion, R.39 to R.42). Alvin Jordan was issued a summons to appear at trial, (Rule 30, R.3), apparently trial counsel failed to call Mr. Jordan as a witness. The defendant anticipated Mr. Jordan's testimony would challenge, contridict and contest that of Mr. Kenny's of the incident particularly on the home invasion charge. Another witness, Barry L.La Riviere, whom **gave** a detailed statement to the police was never interviewed; or, called to testify. (Rule 30, R.33).

The trial Counsel failed to request hospetal records to impeach Mr. Kenny's testimony of being at the hospital for 4 to 5 hours after examination. (Rule 30, R.50). The defendant's request for post conviction discovery of medical reports , independent test of the "rock" was sufficient for the motion judge to grant a evidentiary hearing to determine the existence of anticipated exculpatory evidence within these medical records, and the opportunity to summons the witnesses who trial counsel failed to call to testify at trial. The motion judge abused his discretion when he denied the New Trial Motion without a hearing. (Rule 30, R.7 to 32).

Because the two accusers were Springfield, Massachusetts, police officers, whose family members where higher ranked officials of this police department. Mr Hallums was over zealously charged of hideous crimes without any due process, and then overzealously prosecuted of hideous crimes as a result of a incident lasting about 60 seconds, and leaving no serious injuries of any kind with no physical evidence of any kind to corroborate weapons charge. The testimony of several Springfield police officers whom were not present at the scene at the time of this alleged incident, was used at trial. The defendant's request for the overall review of his case was crucial and deserved rights and protection under the law to make sure he was not erroneously charged and convicted.

ARGUMENTS

I. INEFFECTIVE OF ASSISTANCE OF COUNSEL WHERE COUNSEL FAILED TO INVESTIGATE FOR PRE-TRIAL AND TRIAL.

(a) Trial counsel's failure to call the potential witnesses to testify at trial.

The basic defense counsel owes to the administration of justice and as to serve as the accused's counseler and advocate with courage and devotion and to render the effective quality representation.

The defendant was deprived of his right to effective assistance of counsel where counsel failed to call two potential witnesses who will provide vital testomony to the entire incident and would of cleared the defendant of the home invasion charge Alvin Jordan, and Barry LaRiviere. Trial counsels conduct in this case clearly shows incompetency, inefficiency of what is expected from adequacy of representation where pre-trial preparation was vital in case of trial, this did indeed deprived the defense effective assistance, Commonwealth V. SaFerian, 366 Mass. 89, at 96(1974). The trial records reflects both potential witnesses were on the witness list. (Tr.1/11,12). Alvin Jordan was a partaker of the confrontation, and Barry LaRivire, was an actual witness who that same night went down to the police station and gave a statment of the incident, (Rule 30,R. 33-38). The failure to secure testimony witnesses who would have supported the defendants version of the incident, created a reasonable probability that the outcome would have been different, Luma V. Cambra, 306 F.3d. 954-57(2002).

In Luma, (306 F3d. 954-57), defense counsel failure to interview, or obtain exculpatory statements from exonerating witness did prejudice the petitioner see, Brown V. Myers, 137 F3d. 1154(1998)

A attorney must engage in the reasonable amount of pre-trial investigation and, at the minimum, interview potential witnesses and make independent investigation of relevant facts and curcumstances, failure to interview eyewitnesses to crime strongly supports the claim of ineffective assistance of counsel, and when the alibi witness is involved, it is unreasonable for counsel not to try contact witnesses and ascertain wheather testimony would aid the defense. Bryant V. Scott,28 F.3d. 1411(1994) Reversed. Held that counsel was ineffective for failing to investigate alibi winess made known to counsel days befor trial, failing to interview eyewitnesses, and co-defendants deprived the defendant s U.S.C.A. Const. Amend. 6. The same in this case where counsel failed to interview co-defendants and eyewitness was not reasonable. Gray V. Lucas, 677 F.2d. 1086, 1093 n.5(5th. Cir.1998). See Kemp V. Leggett, 635 F.2d. 453, 454(5th. Cir. 1998).

By trial counsel failing to call both of these witnesses or interview them befor trial constituted ineffective assistance of counsel. Lord V. Wood, 184 F.3d. 1083(1999) Reversed. In this Commonwealth case Commonwealth V. Delacruz, 61 Mass. App. Ct. 445(2004).

In DelaCruz, his strongest ground for requesting a new trial was trial counsels failure to call his co-defendant as a defense witness.

Every state defendant has the right not only to the timely appointment of counsel, but also to the assistance of counsel

whose quality of performance does not fall below a minimum level of effectiveness, McQueen V. Swenson, 498 F3d. 207(1974) Here it is clearly a fact the defense counsel failed to investigate anything pertaining to these serious charges home invasion against client than to interview client failed to render effective assistane of counsel U.S.C.A. Const. Amends.6,14. U.S. V. Moore, 554 F2d. 1086,1093(D.C. Cir.1996), stating that anticipation of what a potential witness would say does not excuse the failure to find out, in the context of an attorney who failed to contact a witness because he was confident of what the witness would say. There is no strategy in this case where witnesses statements, said the defendant did not commit any kind of home invasion, or armed assault, no where in there statements did they say the defendant hit Mr. Kenny with a brick or bottle.

Defense counsel's failure to contact two witnesses defendant was with during event which led to his arrest was indeed ineffective of counsel, Workman v. Tate,957 F.2d 1339 (1992). See Ford v. Parrat, 638, F.2d. 1115, 117 (8th Cir. 1981), is repeatedly stressed the importance of interviewing witnesses for the preparation of defense.

Under the Sixth Amendment, every criminal defendant has the right to have compulsory process for obtaining any and all witnesses in his favor. Taylor v. Illinois, 484 U.S. 400, 408, 108 S.Ct. 646, 98 L.Ed. 798 (1988), qouting Pennsylvania v. Ritchie, 39, 56, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987). Every person accused of a crime has the fundamental right to present witnesse in his own defense, Washington v. Smith, 219 F.3d. 620, 623-31 (7thCir 2000),

performace prong metwhen counsel failed to produce critical alibi witnesses at trial, Hadley v. Goose, 97 F. 3d. 1131, 1135 (8th Cir. 1996).

It is fact that defense counsel did not investigate any of the witnesses, nor call any of them to trial which deprived Mr. Hallums of a fundamental essential element of due process of law, and a fair trial a Constitutional violation.

(b) Trial counsel deprived the defendant effective assistance of counsel where he failed to subpoena medical records of the accuser.

The accusers were no ordinary victims, they are public officails. The defendant was in need of proper investigation to determine what really happened not any strategy or tactics. Trial counsel had a duty to explore every avenue to try to get some kind of justice and not get his client falsely accused on these serious charges. Rules of Court 3:07, a lawyer is a representative of the client, an officer of the legal system, and a public citizen having a special responsibility for quality of justice, Rule 1.1, Competence, Rule 1.2, Scope of Representation, Rule 1.3, Diligence.

The principle is fundamental that failure to conduct a reasonable pretrial investigation may itself amount to ineffective assistance of counsel. Strickland v. Washington, 446 U.S. 668 (1984). There is no excuse for counsel not requesting medical records of a victim who claimed he was viciously assaulted with a brick and bottles by three men, and being hit by these men over 15 to 20 times with these weapons and then gave testi-

mony under oath he went to the hospital and was examined. (Tr.2/114,117,119,125,127 128). Bouchie v. Murry, 376 Mass. 324, (1978). In interpreting medical records exception to the hearsay rule to determine whether certain portion of records might relate to treatment and medical history are admissiblle, purpose of hospital records statute, to admit presumptively relaiable evidence without necessity of calling numerous hospital personnel as witnesses, must be kept in mind. M.G.L.A. c.233§79. Pleps v. MacIntryre, 397 Mass. 459 (1986). Information must be recorded from personal knowledge of entrant or from compilation of personal knowledge of those under medical obligation of personal knowledge of those under medical obligation to transmit such information; voluntary statements of a third person appearing in record are not admissible unless they are offered for reasons other than to prove truth of the matter contained their in or, if offered for their truth, come within another exception to hearsay rule or be made under circumstances which guaranteed their trustworthiness.

> **Indeed, if the medical records were requested pursuant to M.G.L.A. c. 233§79, the records would have been admissable into evidence. Rule 803(a) Federal Rules of Evidence, 55 ALR. Fed. 689.**

When a case hinges all-but-entirely on whom to believe, an experts interpretation of relevant physical evidence (or lack of it) is the sort of "neutral, disenterested" testimony that may well tip the scales and sway the fact finder. Swofford v. Dobuck, 137 F.3d 442, 443 (7thCir.1998). The accusser gave a statement and gave a testimony under oath all through trial on

how he was viciously attack and then treated at a hospital. Him being a police officer and for insurrance reasons, this examination had to be documented not only for him, but also for the hospital's safety. There where five different versions and statements given by witnesses of the incident. (Tr.3/38). The defendant's counsel should have represented his client zealously within the bounds of law, A.B.A. Standard 4.4,1. Where the investigation of the process shall begin immediately the appearance of counsel. Paval v. Hollins, 261 F.3d 210(2001).

If Mr Kenny did go to a hospital to be examined for his alleged injuries, those records should still be in existence. (Tr.2/127, 128). Why not subpoena records of a victim that claimed he was hit in the face and body with bricks and bottles 15 to 20 times for purpose of perjury defense. These records (if they exist) would have proved fruitful to the defense. It was counsel's duty to investigate all avenues surrounding the claim of assault of the accuser. Trial counsel's failure to do so violated defendant's Fourteenth Amendment Due Process guarantee of his Sixth Amendment right to the assistance of counsel. Bouchillon v. Collins, F.2d 589-597 (1990). A particular decision not to investigate must be directly assessed for reasonableness in all the circumstances. Counsel has duty to make reasonable investigations.

> Mass. Crim. Practice Volume 1, (Wounds), and injury can tell a great deal about the incident that caused it; How, When,and Where.

In this case the defendant's contention is akin to those made in, United States v. Tucker, 716 F.2d 576, 581 (9th Cir 1983). Wherein that court stated "the inadequacy of counsel's pretrial investigation 'alone' is sufficient to carry Tucker's initial burden of demonstrating that he was denied a fair trial ... As the court in Ewing v. Williams noted, 'a court may find unfairness--and thus prejudice--from the totality of counsel's errors and omissions.'" Id. at 596 F.2d 391, 396 (9th Cir. 1979). See also, Holsomback v. White, 133 F.3d 1382 (11th Cir 1998). Where the Eleventh Circuit agreed the petitioner received ineffective assistance of counsel where his trial counsel failed conduct pretrial investigation into the conceded lack of medical evidence (against the petitioner), including trial counsel's failure to consult with any physicians concerning the significance of the lack of medical evidence in the case. Moore v. Johnson, 194 F.3d 586 (1999), this case was affirmed with the district court holding that counsel did not make an informed of strategic judgement not to investigate, develope or present mitigating evidence that is entitled to defernce under Strickland.

Mr. Hallums informed trial counsel repeatedly prior to trial and during trial that he never struck Mr. Kenny, especially with a brick or bottles. It was counsel's duty to corroborate the defendant's defense given the seriousness of the charges. There is no argument that can overcome the fact that better work provided the defendant with a defense against these charges in

this case. Even if we assume that trial counsel's performance at trial was in some incredible sence adequate, we are still faced with the impact of his ineffective inadequate performance prior to trial on Mr. Hallums' right to a fair trial. As the Eight Circuit observed in McQueen v. Swenson,"the exercise of the utmost skill during trial is not enough if counsel has neglected the necessary investigation and preparation of the case or fail to interview essential witnesses or arrange for their attendance." (Citation omitted), Id. at 498 F.2d at 215-16 (8th Cir. 1974). The defendant Mr. Hallums', trial counsel's failure to investigate or offer available mitigating evidence was professionally unreasonable constituting deficient performance denying Mr. Hallums due process, and prejudice to a fair trial.

Furthermore, despite the intensity of the action alleged in this incident as testified to by Mr. Kenny. For this alleged assault to have occurred in a small place such as this house porch, there should have been some kind of damages to the door and hallway of this house;

(c) Trial counsel's lack of diligence deprived the defendant effective assistance of counsel where counsel fail to have the allegde weapon "rock" examined for blood, skin, hair, fibers and ect..., and he failed to obtain photos of the alleged crime scene for trial purpose.

However, there was no damages to the property presented at trial , and no finger prints of the defendant (whom was not wearing

gloves this particular day) or no kind of physical evidence demonstrating the presents of three men in combate on this small porch. (Tr. 2/129). The bottles tested came back negative for any finger prints of the defendant. The photos of the bottle and the brick at trial showed niether one in them only the ground upon which they were said to have been. (Tr. 3/15). There was no testing done on the brick for blood, skin cells, or fibers from the defendant or the victim. (Tr.3/17). There was know photos of the porch disclosed by the prosecution, so no determination could be made regarding this part of the story, nor any defense to this part of the story. (Tr. 3/27).

When a crime is committed and there is the allegation that a weapon was used, the weapon is ought out. Where the weapon is deemed found, it is common practice for police to have the weapon tested as a matter of positive identification to see if weapon was used in the crime as alleged. When the State does not test the weapon, a seasoned attorney acting as a diligent conscientious advocate in his obligation to provide effective assistance in zealous representation of his client, (per. U.S. Const. Amends. 6, 14), "has duty imposed by both State, see Commonwealth v. Baker, 440 Mass. 519, 529 -530 (2003), citing and quoting Commonwealth v. Saferian,366 Mass. 89, 96 (1974), and Federal, see Strickland v. Washington, 466 U.S. 668, 690, 104 S.Ct. 2052 (1984), constitutional law to conduct an investigation of the facts," in order to make

strategic tactical judgements. Baker, Id. at 440 Mass. 519, 529-530 (2003). This serves to provide defendant substantial ground of defense, to include or exclude weapon, corroborate or dispute story, and implicate or exonerate the accused. The U.S. Supreme Court's position taken in case where the defendant has presented facts akin to the facts basis of claims raised by Mr. Hallums gives strong guidance. "Where counsel is ineffective and better work might have accomplished something material for the defendant he would be afforded a new trail in the interest of justice." See Strickland, supra, Id. at 466 U.S. 668, 687 (1984). "When the State does not have a weapon tested, the counsel sworn to defend his client should have the weapon tested to exonerate his client." See Pavel v. Hollins, 261 F. 3d 210 (2001), see also Blake v. Kemp, 758 F.2d 523, 535 (11th Cir. 1985), holding that an attorney's performance was deficient under Strickland's first prong, where inter alia, the attorney failed to prepare for state post conviction because he believed his client would not be convicted.

The opposition is to argue that counsel's representation of Mr Hallums was zealous, and counsel's mere failure to meet defendant's demands many of which the state court determined were unreasonable or unrealistic, and do not equate to the defendant's claim of ineffective assistance of counsel; However,

> **"neither he, nor the court could say what a prompt and thorough going investigation might disclose to fact."** See Powell v. Alabama, 787 U.S. 45, 53, 58

(1993).

Mr. Hallums case record docket entry (prima facia evidence) reflects the only motion filed by counsel was to receive funds for an investigator, only there was no evidence of his investigation ever provided to the defendant. (Rule 30, R.1-6). Living in the twenty first century defendant should have the right to due process of the highest extent, with the existance and the assistance of forensic science experts available in this day and time. The U.S. Supreme Court's landmark decision in Gideon v. Wainwright, 372 U.S.335, 83 S.Ct. 792 (1963), made it clear four decades ago that the right to counsel, guaranteed to federal defendants through the Sixth Amendment cluase is a fundamental right guaranteed to state defendants through the due process cluase of the Fourteenth Amendment.

> A.B.A. Standards for Criminal Justice, Standard 4-1., 1. Defense counsel should seek to reform and improve the administration of Justice. When inadequacies or injustices in the substantive or procedural law come to defense counsels attention, he or she should stimulate efforts for remedial action.

Defense counsel in common with all members of the bar is subject to standards of conduct stated in statutes, rules, decisions of courts, codes and canons of professional conduct. Mr. Hallums trial counsel failed grossly to reflect these standards in his representation which gravely affected the outcome of this case. Notwithstanding the court failure to take action for the jury to view the alleged crime scene. (Rule 30, R.3. paper entry #19.0). Counsel let the jury guess the evidence.

The defendant's due process was violated from day of his arrest not neglecting to bring these concerns to the attention of trial counsel, he even spoke to the judge about his dissatisfaction with the representation he was receiving from counsel. (Rule 30. R.53). Then appellate counsel withdrew from his case refusing to honor the request of Mr. Hallums and raise the issue of ineffective assistance of counsel in his appeal. After the appointment of new appellate counsel, whom fail to raise this issue in his appellate brief of the case, after affirmance of the conviction counsel withdrew leaving the defendant to pro se these matters.

The defendant issue is not without merit or foundation , nor is it sui generis. The Massachusetts Supreme Judicial Court, the State Attorney General, the head of Committee for public counsel services and others all acknowledged the unwillingness of the State Legislature to raise pay for court appointed counsel since 1997. This Prompted "systemic failure." In Lavallee v. Justices in Hampden Superior Court and others, 442 Mass. 228 (2004), the states highest court reviewing the condition of court appointed counsel in the context of not enough, with the reason why, and the consequence. The court reasoned in this published opinion and declaration, inter alia. "Public safety ..., comes with a cost. One of the components of that cost is the level of compensation at which counsel for indigent defendants will provide the representation required by our Constitution. See, e.g., Smith v. State, 118 N.H. 764, 771 , 394 A.2d 834 (1978),...other courts that have considered questions similar to those presented in this case, lack of counsel

or the inadequate compensation of counsel is instructive. Concluding that the 'inadequate compensation of counsel amounts to the deprivation of the constitutional rights of the criminal defendants represented by inadequately compensated counsel,...' The inadequacy of compensation for private attorneys who represent indigent criminal defendants has persisted for many years. The continuation of what is now an unconstitutional state of affairs ..." Lavallee, supra, Id. at 442Mass. 228 (2004).

Inlight of the aforemented opinion of the Massachusetts Supreme Judicial Court on the matter of inadequate compensation as it deprives indigent defendants of their constitutional rights. Any opposition to Mr. Hallums' claim and contention of receiving ineffective assistance of counsel must fail. By the opinion of the states highest court, the inference can be drawn that intrinsically ineffective assistance of counsel created by inadequate compensation existing for the last two decades substantually contributed to the grossly dificient conduct of Mr. Hallums' trial counsel. Thus prejudice to Mr. Hallums' Due Process and Sixth Amendment guarantees.

In conclusion, facts in record of case support petitioner's argument. (a) Trialcounsel fail to interview and call potential witnesses. (b) Trial counsel deprived petitioner effective assistance where trial counsel fail to subpoena medical records of the accuser. Furthermore, (c) trial counsel deprived the defendant effective assistance where he fail to investigate/test the alleged weapon "ROCK" for trace evidence of blood, skin tissue, hair,

fibers ect..., alleged used in alleged assault, and he failed to obtain photographs of alleged crime scene and the accusers alleged injuries especially for trial purposes. "Strategice choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgments support the limitations on investigation." Wiggins v. Smith, 539 U.S. 510, 533, 123 S.Ct. 2527, (2003), qouting from Strickland v. Washington, supra at 690-691, 104 S.Ct. 2052. Trial counsel's ommissions demonstrate a dereliction of duty imposed by State and Federal Constitutional law,causing prejudice to Mr. Hallums' right to a fair trial, resulting in his conviction.

ARGUMENTS

II. PROSECUTIONS CLOSING STATEMENTS WENT BEYOND THE REALM OF "FAIR" AND WERE IN FACT PREJUDICIAL AND CREATED A RISK OF MISCARRIAGE OF JUSTICE.

(a) Prosecutor's closing statements relevant to the"rock" were overzealous and missleading.

The prosecutors statement, what test should we run on this rock, there is no such mythical test on a rock. (Tr. 3/38,50) This closing statement was misleading to the jury to think there is no such kind test that could have been performed on the brick that they put into evidence. The accuser gave testimomy that he was assaulted 15-20 times with the brick (Tr. 2/53,103,118). The prosecutors statements whether the police could have taken photos and that there is no mythical test that can be done on a brick was a opinion not a fact. The Prosecutor is not a expert in scientific or forensic expert to weigh a opinion like that to a jury. The prosecutor has exceeded the bounds of proper closing argument U.S. V. Cotter, 425 F.2d. 450,452-453(1st. Cir.1970). The prosecutors statement violated the rule that closing arguments be limited to the "evidence" Commonwealth V. Earltop, 372 Mass. 199,205, (1977). It is fundamentalviolation when a prosecutor puts the jury in summation of facts or objects that have not been subject to cross-examination, rebuttal, and a oppertunity to adress in argument. Rules of Professional Conduct and Comments, 3:07, Rules of Court.

The prosecuter succeeded in excluding evidence, then inviting the jury to draw from the absence of the evidence.

By the prosecutor using the statement "THERE IS NO MYTHICAL TEST ON A ROCK", (Tr.3/38), was improper. Since there is a general acceptance among the scientific field which does D.N.A. testing on all types of objects, Commonwealth V. Sok, 425 Mass. 787-789(1997) See, U.S. V. Lowe, F. Supp. 401,418(D.Mass.1997). The prosecutor improper statement only served to make it less likely that the jury will return with a verdict based on fair calm consideration of the evidence. The weapon being a brick with four sharp edges and the ridges should have been some kind of scrapes or scratched the victims skin which could extract blood,fibers,ect , from hitting against a person that many times. Commonwealth V. Gallarelli, 399 Mass. 17(1987).

> **In Gallarelli, the defendants request for police reports and scientific reports of showing absence blood on the knife recoverd from the defendant, and therefore required prosecution to disclose laboratory report, if defendant show a substantial basis for claiming that report was material and entitled him a new trial. Id.**

By contrast, many state appellate court have, continued to analize the admissibility of scientific evidence under, Frye V. United States, 293 F. 1013,1014(D.C.Cir.1993), and an apply de novo standard of review. See, State V. Bogan, Ariz. 506,509,905 P.2d. 515(Ariz. Ct. App. 1995). We are living in a world that is scientifically advanced there are so many analysis and methods in the forensic and scientific field from the government and many private laboratories. The prosecutor gave his personal opinion and forced this statement on the jury. For the prosecutor to say there is no such forensic laboratories that would have tested review, analize, and interpret procedures and protocals

on this rock was indeed a personal opinion and improper statement. The Commonwealth didn't substain the burden of proof with the regard to the reliability of forensic testing. For the prosecutor to say there is no such thing is a misscarriage of justice, United States V. Cotter, F.2d. 405,452-453(lst.Cir.1970).

The scope of proper argument is simply stated. Counsel may argue as to the evidence and "fair" inferences from the evidence , Commonwealth v. Seviere, 409 N.E. 2nd. 481 Mass. App. Ct. 745 (1986), See, Commonwealth V. Berrio, 43 Mass. 836,(1997), Qouting, Leone V. Doran, 363 Mass. 1,18,292 N.N. 2nd. 19(1973), Trial counsel are or should be familiar within the rule, as set out in many cases, the constitutional demension.

Rule 3.8 Special Responsibilities Of A Prosecutor, A-J, list the obligation and the responibilities, he or she is the Minister of Justice and not simply that of a advocate. This does carry within specific obligations to see the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. In paragraph,(h)-(i) respectfully stated the limitations of personal knowledge of facts and personal opinion on matters before the tier of fact. So in this case where the brick was heavly used throughout the trial the prosecuter impermisssibly argued fact not in evidence, because the lack of test he made his own calculation that was improper, forcefully and aggressively was so overwhelming that it prejudice the defendant.

(b) Prosecutor's closing statements based on race deprived the defendant of fair trial when he injected comment on race.

At no time in the trial did the defense ever play the race

card, nor is the pititioner now. The reality is that we still have racial problems today and this case was never handled in just way, it has to be reviewed with the fairness of the law,

> **This was a very deep remark and a low blow to the defense. People do make judgements based on race and sometimes police do that. Ladies and Gentlemen that is not a issue in this case. It is something to cloud the waters in this case.**

The prosecutor was in full power to inject this into a jury of 11-whites, to the only one black women on the jury in this case that sat on the jury. In a stage where the prosecutor has full advantage the remarks were interally injected. A prosecutor may not appeal to ethic race or racial prejudice to obtain a guilty verdict, or inject his or her opinion beliefs into closing arguments, Commonwealth V. West, 688 N.E. 2nd. 1378,44 App. Ct. 150(1998).

> **Personal knowledge, opinion or belief. It is impermissible for trial counsel to inject his beliefs into closing arguments. U.S. V. Pinede-Ortuno, 952 F.2d. 98(1992).**

Rule 3.8, Speacial Responsibility of a Prosecutor, (g-j) (The prosecutor is prohibited extra judicial statements, and can and should avoid comments which have no legitiment purpose and have substantial liklyhood of increasing public opprobrium of the accused. A prosecutor shall not assert a personal opinion as to the justness of a cause as to the guilt or the innocence of an accused). This remark could have stirred up some racial hatred among the jury, and made them chose a side instead of facts. This was impermissible to inject his personal belief and opinion into this jury in his closing argument Chapman V. California, 386 U.S. 18,87 S. Ct. 824,17 L.Ed. 705

(1967). See Francis V. Franklin, 471 U.S. 307,105 S.Ct. 1965 L.Ed. 2nd. 344(1985), Quoting, Commonwealth V. Lara, 39 Mass. App. Ct. 546,551-552(1995)

> In Lara, the reference to group membership or race may have awaken bias among some jurrors. For this reason the prosecutor had a duty to steer clear of making such charatizations to avoid the possibility of warranting a new trial.

The defendant was totally under-represented on the jury panel with only one African American. The defendant was not being judge by a jury of his peers. The prosecuror was fully aware of the 1 black women to 11 white on the panel. This statement injected racial hatred into the trial. Commonwealth V. Mahdi, 388 Mass. 697,692-693,(1983). Quoting, Smith V. Texas, 311 U.S. 128,130,61 S.Ct. 164,85 L.Ed. 84(1940).

The commonwealth asserts that the standards enuciated in Swain V. Alabama, 380 U.S. 202,85 S.Ct. 824,13 L.Ed. 795(196-5), should be incorporated into the Massachusetts, Constitution that the protections offered by the right to trial by a jury of your peers, guaranteed by Art.12, provide an basis for examination of the prosecutors use of peremptory challenges to exclude black juroros. Because of the lack of African-American in the jury selection the defendant at least deserved a fair trial free from prosecutors scheme to get a conviction.

In conclusion of these remarks are indeed personal opinions. We agree that a prosecutor is the representive not of a ordinary party to controversy, but a sovereignty whose is obligated to govern, and whose interest, therefore, in a cri-

minal prosecution is not that it shall whin a case, but that justice shall be done. Berger V. United States, U.S. 78,88,55 S.Ct. 629,79 L.Ed. 1314(1935. The improper closing of the prosecutors, the conducting of the test of the rock, stating that there is no kind of testing the weapon that its a "myth", and injecting racial aspects into closing stirring up the jury to think other than the facts created a substantial risk of miscarriage of justice.

ARGUMENTS

III. THE ARMED BURLARY AND HOME INVASION CHARGES NEVER REACHED THE ELEMENTS OF THE INDICTMENT CHARGES.

(a) The accusser claimed he was pushed through a door in a struggle and then retreated, there was no actual breakin in this case.

The Appeallate brief that the defendants Appeal Counsel filed to the Appeal Court speak for itself,there must be a breaking and a entering to constitute a burglary crime. See Commonwealth V. Cotto, 52 Mass. App. 225,228435 Mass. 1101(20-01). An intruder breaks to enter by moving to a material degree something barred the way. Commonwealth V. Tilley, 355 Mass. 507,508(1969). The word "break", as it appears in statutory crimes against property, retains its common law meaning, which includes the doctrine of constructive breaking. Commonwealth V. Labare, 11 Mass. App. Ct. 370,377(1981). A constructive breaking is one invoving elements of trickery and subterfuge. Labare, 11 Mass. App. Ct. at 347 (discussing precedential value of Commonwealth V. Lowery, 158 Mass. 18,32(1893).

Mr Kenny testified that he was pushed through the door into his house (Tr.2/56). He also claimed the door was not locked (Tr.57)" it was just pulled closed and I fell into the door fighting them (Tr./58), and then Mr Kenny testified that he simply one pushed all three men at one time back out the door (I took them like this, and threw them and slam the door and then locked the door behind me)(Tr.2/59). The Commonwealth theory was that the breaking occurs when the three men pushed Mr Kenny

through the door. Indeed, the fact of a push from phyiscal contact, as opposed to the push of the directional movement of the combat, is less than clear from the evidence. Mr Kenny tells us ...they backed me against the door...and I fell into the door fighting them (Tr.2/57-58). He said, the door was ajar it was'nt locked. Because there was no damage to the door or its hardware (Tr.2/129), in any event, whether the door was ajar is not pertinent, See Commwealth V. Purcell, 19 Mass. App. Ct. 1031(1985)

Per curiam, allowing inference that defendant moved the door, left ajar, to the material gegree, exept to indicate the likelihood of an open due to Mr Kenny deliberate (force) retreat.

To have push someone against a door or through a doorway into his dwelling is not breaking in common law tradition. Breaking has long been understood to include all actions that violate the common security of dwelling Commonwealth v. Burke, 392 Mass. 688, 689-690 (1984). The purpose of the burglary statutes is to proscribe conduct violating a person's tight of security in a place universally associated with refuge and safety , the dwelling house. Mr. Kenny left the common security of his dwelling when he confronted the three men outside. (Tr.2/49-50). A dwelling's common security does not come into play simply due to the directional movement of a resident's street combat. Mr. Kenny showed no interest in security, refuge , or safety of his dwelling, and no statute proscribes armed burglary of a neighborhood , much less a neighbor hood with a large public park. (Tr.2/42, 2/70-71). The 20 to 30 year sentence hardly reflects the facts related by Mr Kenny and the indictment indicates rampant overcharging.

Applying a redifinition or expansion of the common law notion of breaking to the defendant in this case generally implicates the due clause of the 14th Amend., U.S. Constitution, an Article 12, of Massachusetts Declaration of rights. The expansion of the breaking element include the eventual move-memnt of a outdoor fight aggravates or makes greater the offense of armed burglary. See Commonwealth v. Bargeron, 402 Mass. 589 (1988), discussing Calder v. Bull,,3 U.S. (3 Dall.) 386, 390 (1798). But see Commonwealth v. Santiago, 428 Mass. 39, 43 (1998).

The fight that began befor entry, resulted in an entry and continued after entry fails to satisfy the intended felony element of armed burglary charge (as assault and battery with a deadly weapon. The phase to "tc commit " imples an act intended in the future rather than past or ongoing one. See Commonwealth v. Brown, 431 Mass. 772, 775 (2000) (underfined statutory terms must be understood in accordance with generally accepted plain meaning). The necessity of intending a factually distinct felony pertains to the instant case because arm assault in a dwelling under G.L. c. 265, §18A is a lesser included offense of armed burglary under G.L. c., 266 §14. Commonwealth v. Enos, 26 Mass.App.Ct. 1006, 1008 (1998). The crime of armed assault in a dwelling requires a specific intent. There was no person within the resident's dwelling at the time of the incident alleged to constitute a breaking.

This element that the commonwealth must prove beyond a reasonable doubt is the breaking and entering took place at night while a person was lawfully in the house.

It would defy the law of phhsics for Mr Kenny to have been both in the house and simultaneously out side instrumentally used

for breaking into the house. Notable, the entry into the porch does not put Mr. Kenny within the dwelling according to the moderl Penal Code § 221(1),(1962) any one could have entered his porch that leads to the house during the evenig of questing. We would assume a visitor would assume to have to enter the porch to get to the house. See and compare Commonwealth V. Pietrass, 392 Mass. 892.901(1984),(any vistor would naturally expect to pass the porch to gain access to the front door).

In Mr Kenny testimony he said, the door was ajar (Tr.2/56-58), Meaning the door was not closed, entry through an open door is not a breaking Commonwealth V. Steward, 7 Dane Abr. 1361789) The key element to armed burglary, is who ever, after the having entered with such intent, breaking such dwelling house at night time. There was no actual breaking un this case, there must be both a breaking and entering to constitute a burglary crime Commonwealth V. Cotto, 52 Mass. App. Ct. 225,227(2001). The purpose of the burglary statute is to prescribe conduct violating a person's right of security in a place universally associated with refuge and safty of the house. Breakin requires the intruder's material movemnt of inanimate something Barring the way, Tilley, 355 Mass. at 508. and here, neither Mr. Hallums nor his companions moved anything inanimate. Case law dose not support the concept of break by moving someone that barred the way. Pushing someone into his doorway into his dwelling is not a breaking in the common law and fails to reach the elements of armed burglary warranting a dissal of indictment as a matter of law.

(b) There was no person within the dwelling of the alledge breaking to constitute home invasion.

The home invasion statute does not pertain to a fight that begins on the street and proceeds without cessation across one's combatants threshold. The gist of the crime is an unlawful entry, knowledge of one or more persons inside, and committing an assault, or intentionally causing injury. Commonwealth V. Mahar, 430 Mass. at 651 n.4. Qouting State V. Tippett, 270 N.C. 588,595(1967),(requires the presence of someone at the time of the breaking and entering).

The home invasion statute punishes more severly the armed intruder who invades another's dwelling while knowing that one or more is present and then proceeds, to assault those individuals. Commonwealth V. Dunn, 43 Mass. App. Ct. 58,63,1108(1997). The statute does not appear to intend imposition of a 20 year mandatory minimum when an assault commences prior to entry in the context of a continuous fight. That intent and its predicate pertain a fortiori to home invasion precisely because what sets home invasion apart from similar crimes is the additional element that the the armed intruder knows, or should know, that an occupant is present before entry.

The continuing series element must be further defined in the indictment beyond the statutory langage to inform the defendant of the crime which he is charged United States V. Revera, 837 F.2d. 906(10th. Cir.1988).

In the instant case, the notion of home invasion (or residential burglary) does not pertain to the criminal enterprise where the resident was not present within his dwelling after exiting his residence. The occupant was not "confronted" by the intruder

Commonwealth V. Goldoff, 24 Mass. App. Ct. 485,462(1987), rather Mr Kenny did confront the three men on the street. When Mr Kenny left his residence (Tr.2/49-50,2/112) he also left his right to security in one's place of habitation, Goldoff, 24 Mass. App. Ct. at 462.

Mr Kenny left his place of refuge and safety and initiated the confrontation, he defeated the intent of home invasion statute. Nothing in the statute implies on, on agian off again right during the course of continuous fighting, and any contention to the contrary is too speculative to survive 14th. Amendment Due Process scrutiny. See United States v. Batchelder, 442 U.S. 114 123 (1979), (no one maybe required at peril of life, liberty or property to speculate as to the meaning of penal statutes). In Commonwealth v. Mitchell, No. 05-P-1246, Grasso, Doerfer, Mill, JJ.,(2006), cited the petitioner's case, Hallums, 61 Mass.App.Ct. 50, 53 (2004).

> In Commonwealth v. Hallums, 61 Mass.App.Ct. 50, 53 (2004), we assumed that the armed burglary statute required that the victim be present at the time of entry, but held that the evidence permitted the jury to find that the victim was in his home at the time the defendant entered even though the defendant gained entry by pushing the victim ahead of him . It was not necessary made any difference if the defendant stepped through first.

As we read there was no mention of any body present during the break. In any event, the rule of lenity, Bell v. UnitedStates, 349 U.S. 81, 82 (1955) should have been applied. Smith v. United States, 508, U.S. 223, 246 (1993), (Scalia, J., dissenting) even if the readwer does not consider the issur to be clear as (we) think, that is eminently debatable-and that is enough, under the rule of lenity, to require finding for the defendant.

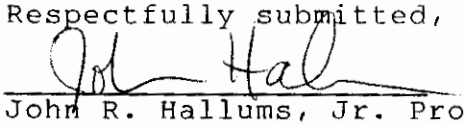
Where "a statute can be made constitutionally definite by a reasonable construction, the court is under duty to give that construction." Thomas v. Commonwealth, 355 Mass. 203, 207, (1969).

The home invasion statute is altogether too problematic to apply confidently to an ongoing fight that began on the street and momentarily crosses a resident's threshold before that resident over powers his opponents, (Tr.2/59), and then chase them down the street. (Tr.2/61). Just a prosecutor can manipulate the same evidence rule so as to harass and oppress. Commonwealth v. St. Pierre, 377 Mass. 650, 662 (1979). The petitioner Mr. Hallums was here grossly overcharged.

CONCLUSION

For the foregoing reasons the indictments of (Armed Burglary and Home Invasion) should be dismissed as a matter of law.

Respectfully submitted,



John R. Hallums, Jr. Pro se
One Administration Road
Bridgewater, MA. 02324

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

(CERTIFICATE OF SERVICE)

I, John R.Hallums,Pro-Se petitioner hereby certify that on this 14 day of Dec year 2006, I did indeed serve a copy of the same Memorandum Of Law In Support Of Writ Of Habeas Corpus 28, U.S.C. 2254(b), upon the Attorney General Office, Asst. Eva M.Badway, at One Ashburton Place, Boston MA. 02108, by first class mail postage prepaid.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY.

Respectfully Submitted
By Petitioner Pro-Se

John Hallums

John R.Hallums#w69281
One Administration Rd.
Bridgewater, MA. 02324